STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 20, 2006
v	No. 259499 Genesee Circuit Court
GLEN LAVELLE VARY, Defendant-Appellant.	LC No. 04-014350-FC

Before: White, P.J., Whitbeck, C.J., and Davis, J.

PER CURIAM.

A jury convicted Glen Vary of first-degree premeditated murder,[1] first-degree felony murder,[2] assault with intent to commit murder,[3] assault with intent to rob while armed,[4] and possession of a firearm during the commission of a felony.[5] The trial court sentenced Vary to concurrent terms of life imprisonment for the first-degree murder conviction,[6] 225 months to 40 years' imprisonment for the assault with intent to commit murder and assault with intent to rob convictions, and a consecutive two-year term of imprisonment for the felony-firearm conviction. Vary appeals as of right. We affirm.

I. Basic Facts And Procedural History

Vary's convictions arise from the shooting death of Robert Montgomery and assaults against Darwin McMullen. Vary was tried jointly with codefendant Fredrick Relerford, before separate juries.

[1] MCL 750.316(1)(a).

[2] MCL 750.316(1)(b).

[3] MCL 750.83.

[4] MCL 750.89.

[5] MCL 750.227b.

[6] The two first-degree murder convictions were "merged" for sentencing purposes.

II. Great Weight Of The Evidence

A. Standard Of Review

Vary argues that the jury's verdict is against the great weight of the evidence because the evidence was insufficient to link him to the charged crimes. Because Vary did not raise this issue in a motion for a new trial in the trial court, the issue is unpreserved.[7] We review unpreserved issues for plain error affecting defendant's substantial rights.[8]

B. Legal Standards

A new trial may be granted on some or all of the issues raised if a verdict is against the great weight of the evidence.[9] A motion for a new trial should be granted only when the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result.[10] Determining whether a verdict is against the great weight of the evidence requires review of the whole body of proofs.[11] Conflicting testimony and questions of witness credibility ordinarily are not sufficient grounds for granting a new trial.[12] "[U]nless it can be said that directly contradictory testimony was so far impeached that it 'was deprived of all probative value or that the jury could not believe it,' or contradicted indisputable physical facts or defied physical realities, the trial court must defer to the jury's determination."[13]

C. The Evidence

At trial, Darwin McMullen positively identified Vary as one of the offenders, both in court and in a pretrial photographic lineup. Although there were some problems with McMullen's testimony, the testimony was not deprived of all probative value nor was it such that the jury could not possibly believe it. McMullen asserted in court that he was sure that defendant was one of the offenders. The credibility of McMullen's testimony was a matter for the jury.

Vary also notes that potentially exculpatory evidence had not been returned from the crime lab. There has been no showing, however, that the evidence to which Vary refers was actually exculpatory. The mere possibility that evidence exists, the value of which is uncertain, is not a sufficient basis for finding that the verdict was against the great weight of the evidence. Vary raised this issue at trial, and the jury was able to consider its effect. Because the jury's

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[7] *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003).

[8] *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999).

[9] MCR 2.611(A)(1)(e).

[10] *People v Lemmon*, 456 Mich 625, 639, 642; 576 NW2d 129 (1998).

[11] *People v Herbert*, 444 Mich 466, 475; 511 NW2d 654 (1993), overruled in part on other grounds in *Lemmon*, *supra*.

[12] *Lemmon*, *supra* at 643.

[13] *Id*. at 645-646 (citation omitted).

verdict was not against the great weight of the evidence, we conclude that Vary has not shown plain error affecting his substantial rights.

III. Newly Discovered Evidence

A. Standard Of Review

Vary argues that he was entitled to a new trial based on newly discovered evidence. Again, because Vary did not file a motion for a new trial on this ground below, this issue is unpreserved, and our review is limited to plain error.[14]

B. Vary's Argument

Vary asserts that he "was informed and believes, and advised his counsel that Co-Defendant [Relerford] was requesting [to] appear at Appellant's sentencing and testify that Appellant was wrongly accused and was not involved in this incident." When a defendant asserts that newly discovered evidence entitles him to a new trial, he must file an affidavit or make an offer of proof to support his contention of newly discovered evidence.[15] Here, Vary never filed an affidavit nor made an offer of proof showing that codefendant Relerford was indeed willing to testify that Vary was not involved, or the substance of Relerford's proposed testimony. Vary also failed to submit an affidavit from trial counsel. Vary's self-serving statement in his appellate brief is insufficient to substantiate his claim of newly discovered evidence. Thus, we again conclude that Vary has not shown a plain error affecting his substantial rights.

IV. Ineffective Assistance Of Counsel

A. Standard Of Review

Vary argues that he was denied the effective assistance of counsel based on defense counsel's cumulative failure to file motions for a new trial or judgment notwithstanding the verdict (JNOV).[16] To establish ineffective assistance of counsel, a defendant must show that counsel's deficient performance denied him the Sixth Amendment right to counsel and that, but for counsel's errors, the result of the proceedings would have been different.[17]

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[14] *Carines, supra* at 763, 774; *People v Darden*, 230 Mich App 597, 605-606; 585 NW2d 27 (1998).

[15] *People v Messenger*, 221 Mich App 171, 178-179; 561 NW2d 463 (1997).

[16] Vary concedes that defense counsel's failure to make each individual motion does not rise to the level of ineffective assistance of counsel.

[17] *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005).

B. JNOV

A motion for JNOV in a criminal case is actually a motion for directed verdict of acquittal under MCR 6.419(B). In reviewing the motion, "this Court views the evidence in a light most favorable to the prosecution to determine whether the evidence was sufficient to permit a rational fact finder to find the essential elements of the crime proven beyond a reasonable doubt."[18] Here, Vary has waived review of this claim because he fails to explain why he was entitled to JNOV.[19] In any event, viewed in a light most favorable to the prosecution, the evidence was sufficient to establish Vary's guilt of the charged offenses.

Further, in light of our previous conclusions that Vary is not entitled to a new trial based on newly discovered evidence or the verdict being against the great weight of the evidence, defense counsel was not ineffective for failing to move for a new trial on these grounds. Counsel is not required to make meritless motions.[20]

Affirmed.

/s/ Helene N. White
/s/ William C. Whitbeck
/s/ Alton T. Davis

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[18] *People v Partridge*, 211 Mich App 239, 240; 535 NW2d 251 (1995).

[19] *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001) (a party may not merely announce his position and leave it to this Court to discover and rationalize the basis for the claim).

[20] *Mack*, *supra* at 130.